

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-against-

MEMORANDUM & ORDER
06-CR-0550(JS)(AKT)

DAVID H. BROOKS,

Defendant.

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SEYBERT, District Judge:

Pending before the Court is Defendant David H. Brooks' letter motion seeking leave to file a motion to either: (1) compel the Government to produce any court order extending the April 5, 2006 grand jury through the date that the First Superseding Indictment was issued, or (2) have such order produced for an in camera inspection. For the following reasons, Brooks' motion is DENIED AS MOOT.

BACKGROUND

The Court assumes familiarity with the factual and procedural background in this case and will only briefly discuss the facts pertinent to the pending motion. On April 5, 2006, the United States Attorney's Office for the Eastern District of New York empaneled a grand jury (the "First Grand Jury") to convene on or around April 26, 2006. On October 24, 2007, the First Grand Jury returned the First Superseding Indictment in

this action against Defendant Brooks and others. (Docket Entry 51.) The First Grand Jury was discharged on that date.

On July 9, 2009, a different grand jury (the "Second Grand Jury") returned a Second Superseding Indictment against Defendant Brooks and others. (Docket Entry 438.) Brooks went to trial on certain counts of the Second Superseding Indictment in January 2010, and on September 14, 2010, a jury convicted Brooks of counts 1-11 and 15-17 of the Second Superseding Indictment. (Docket Entry 1336.) On August 10, 2011, Brooks pled guilty to counts 18-20 of the Second Superseding Indictment. (Docket Entry 1471.)

DISCUSSION

Defendant Brooks seeks leave to move to compel the production (either to Defendant or to the Court for an in camera inspection) of an order dated on or around October 5, 2007, extending the term of the First Grand Jury, which handed down the First Superseding Indictment eighteen months and nineteen days after it was empaneled. Under Rule 6(g) of the Federal Rules of Criminal Procedure, a grand jury "may serve more than 18 months only if the court, having determined that an extension is in the public interest, extends the grand jury's service." FED. R. CRIM. PROC. 6(g). An indictment handed down by a grand jury "whose life had terminated" is a "nullity" and must be vacated. United States v. Macklin, 523 F.2d 193, 195 (2d Cir.

1975) (internal quotation marks and citation omitted); see also id. at 196 ("The absence of an indictment is a jurisdictional defect which deprives the court of its power to act. Such a jurisdictional defect cannot be waived by a defendant, even by a plea of guilty."); United States v. Armored Transp., Inc., 629 F.2d 1313, 1316 (9th Cir. 1980) ("Such a defect--that the grand jury lost its power to hand down indictments--is jurisdictional and may be raised at any time.").

The Court has confirmed with the Clerk of the Court that no order was ever issued extending the term of the First Grand Jury. Therefore, Defendant Brooks need not make his motion to compel. Nevertheless, even if the First Superseding Indictment is a nullity, this jurisdictional defect was cured when the Second Grand Jury handed down the valid Second Superseding Indictment.¹ See United States v. Bok, No. 95-CR-0403, 1997 WL 148815, at *3 (S.D.N.Y. Mar. 27, 1997) ("[E]ven if the original Indictment was in some way defective, the returning of a Superseding Indictment by a different grand jury cures any prejudice to the defendant that may have been caused by an improper original Indictment."); United States v. Fisher, 692 F. Supp. 495, 504 (E.D. Pa. 1988) (finding that a third indictment

¹ "[T]he law presumes, absent a strong showing to the contrary, that a grand jury acts within the legitimate scope of its authority." United States v. R. Enters., Inc., 498 U.S. 292, 300, 111 S. Ct. 722, 112 L. Ed. 2d 795 (1991).

cured any defects present in the earlier indictments), appeal dismissed, 871 F.2d 444 (3d Cir. 1989); United States v. Newman, 534 F. Supp. 1109, 1110 (S.D.N.Y. 1982) (finding that "both actual and presumed prejudice are remedied by submissions to a new grand jury"), aff'd, 722 F.2d 729 (2d Cir. 1983). Accordingly, the validity of the First Superseding Indictment is now moot.

CONCLUSION

For the foregoing reasons, Defendant Brooks' motion to compel is DENIED AS MOOT.

SO ORDERED.

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: August 24, 2012
Central Islip, New York